86-709

Supreme Court, U.S.
FILED
OCT 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HIROTOSHI YAMAMOTO,
Petitioner,
v.
THE UNITED STATES
Respondent

Federal Circuit Court
No. 86-848
U.S. Claims Court
No. 690-84T
Tax Court
No. 9726-75

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITION FOR CERTIORARI

HIROTOSHI YAMAMOTO, pro se
85-175 Farrington Highway, B426
Waianae, Hawaii 96792

Phone: (808) 6968531

For Petitioner

30 pp

QUESTION PRESENTED

Whether Section 6212 of the Internal Revenue Code, requiring a Statutory Notice of Deficiency (the 90 day letter) *before* the assessment of taxes has been complied with in the enforced collection of $53,640.94 in Minimum Tax with interest and penalties, after the fact of a prior litigation over Section 351, non-recognition of gain (petitioner's contention) versus Section 1239 taxable as ordinary income (respondent's contention); in which prior litigation, Minimum Tax under Section 56 of the Code was not, and could not, have been made, a matter of, or even an implied subject of that prior litigation, by either parties.

Whether the United States Court of Appeals for the Federal Circuit had erred in its affirmation of the Claims Court's conclusion of fact that the required Statutory Notice of Deficiency had been issued. And erred also, in the affirmation of the conclusion of law that res judicata lies in the case at hand where the issue of the applicable Minimum Tax has never received judicial review and adjudication.

Whether the Opinion of the Claims Court, as affirmed by the Federal Circuit Court of Appeals is in conflict with the opinion of the United States Court of Appeals for the Fifth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HIROTOSHI YAMAMOTO,
Petitioner

vs

THE UNITED STATES
Respondent

PETITION FOR CERTIORARI

OPINIONS BELOW

1. Decision of the Tax Court, assessing $3,041.87 and $23,854.18 in Minimum Taxes for 1970 and 1971 respectively. (Exhibit B-1)
2. Opinion of the United States Claims Court (Exhibit C-1 to C-7)
3. Decision of the United States Court of Appeals for the Federal Circuit. (Exhibit D)
4. Judgment affirmed, issued as Mandate, July 18, 1986, Federal Circuit Court of Appeals (Exhibit A-3)

JURISDICTION

1. Notice of Appeal dated July 24, 1986 (Exhibit A-1 to A-4)
2. Jurisdiction is invoked under 28 U.S.C. § 2101 (c)

SUMMARY STATEMENT OF THE CASE

1. In 1970 and 1971, Petitioner-taxpayer transfered his personally owned real estate to Manoa Investment Co., a subsidiary of Manoa Finance Company which taxpayer owned 100%, in order to conver advances to purchase additional stocks in Manoa Finance Co., required to meet the State's 10 to 1, debt to capital ratio.
2. The properties so transfered had an estimated market value in excess of book values, of $28,489.39 and $287,731.83 for 1970 and 1971 respectively.
3. Taxpayer reported this market value excess as long termed capital gains (50% taxable) or $14,244.70 and $148,865.91 respectively on their 1970 and 1971 tax returns.
4. No consideration however was given by taxpayer for Minimum Tax on these reported capital gains for 1970 and 1971. Said Minimum taxes were later determined to be $3,041.87 and $23,854.18 for 1970 and 1971 respectively.
5. As a result of an audit, the Internal Revenue Service made no effort to collect the minimum taxes of $3,041.87 and $23,854.18 for 1970 and 1971, based on the capital gains as declared by taxpayers on their returns.
6. Instead, the Internal Revenue Service sought rather, to recharacterize the capital gains reported, as Section 1239 gains (100% taxable) or $28,489.39 and $287,731.82 for 1970 and 1971 respectively. This resulted in a proposed additional assessment for taxes due of $5,057.93 for 1970 and $75,577.47 for 1971; or a total of $80.635.40.
7. In the ensuing litigation in the Tax Court, taxpayers had recharacterized their reported capital gains as Section 351, tax free exchange of assets for stocks in a controlled corporation.
8. The Tax Court did not accept taxpayers recharacterization of gains as Section 351, tax-free exchanges, nor did it accept the Internal Revenue Service recharacterization of the capital gains filed, as Section 1239 gains (100% taxable). It accepted the capital gains as filed.
9. Taxpayer's appeal to the Ninth Circuit Court on the issue of the denial of Sec. 351 resulted in an affirmation of the Tax Court's decision.
10. Having failed to collect their original assessment, totally $80,615.40, the Service enforced their previously forsaken option, the collection of minimum taxes of $3,041.87 and $23,854.18

(total $26,896.05) which compounded by penalties and interest amounted to $53,640.98. (See Exhibit C-1)

11. The Service computation of the minimum taxes of $3,041.87 and $23,854.18 for 1970 and 1971 respectively was incorporated as part of the Tax Court's decision. (*Exhibit B-1*)
12. Taxpayer's Claim for refund of $53,640.08 was denied by the United States Claims Court. (*Exhibit C-1 to C-7*)
13. Appeal to the United States Court of Appeals for the Federal Circuit affirmed the Claims Court's Opinion and denial. (*Exhibit D*)
14. Combined Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Federal Circuit Court of Appeals. Judgment was issued as Mandate on July 18, 1986. (A-2-1)

ARGUMENT

1. The prior litigation in the Tax Court centered on and was limited to the issue of which should prevail, Section 351, tax free exchange as contended by taxpayer, or Section 1239 normal gain, 100% taxable, as contended by respondent. Minimum tax was not and could not have been an issue in that litigation.
2. Admittedly, and in arguendo, that minimum taxes of $3,041.87 and $23,854.18 for the years 1970 and 1971 respectively, could have been justifiable proposed assessments, the action of the Service in recharacterizing the market value differences as Section 1239 normal 100% taxable gains, rather than capital gains (50% taxable) as filed had foreclosed that possibility.
3. The Service had exercised its option of attempting to collect a total of $80,635.40 in normal taxes (100% taxable) under Section 1239, rather than attempting to, and would have been successful, in collecting the total of $26,986.05 in minimum taxes. It was a judgment call, which did not prevail for the Service.
4. The price for the Service's bad judgment call is that the three years limitation for the assessment and collection of additional minimum taxes had expired in the process. Reg. § *301.6501(a)-1*.
5. The conclusion of facts of the lower courts that the Statutory Notice of Deficiency (90 day letter) was issued for the assessment of the Minimum Taxes at issue cannot be substantiated by an examination of the original document (*Exhibit E-3*), which clearly shows that the proposed assessment was an attempt to recharac-

terize the capital gains reported as Section 1239 normal gains, with the resulting proposed additional taxes of $5,507.93 and $75,577.47 for the years 1970 and 1971 respectively, making a total of $80,635.40.

6. In respondent's computation of taxes due at the conclusion of the tax case (*See Exhibit B-4*) we find a reinstatement of the Capital Gains, as filed. In addition, there appeared additional Minimum taxes of $3,041.87 and $23,854.18 for the years 1970 and 1971, presumably based on the reinstated capital gains.
7. The conveyance of the Minimum taxes due, which the lower courts have ruled to be part of income taxes, was therefore, conclusively not made with the required Statutory Notice of Deficiencies under Section 6212, which gives taxpayer 90 days to respond to a "bill of particulars" with procedures for appellate review and consideration.
8. Since Minimum Tax was not a subject of the prior litigation, the theories of estoppel and res judicata do not lie.

CITATION

The first dictum of its Judgment in *Ina Belle THOMPSON and B. D. White, Administrators of the Estate of I. W. Thompson, et al, Plaintiff-Appellees, v. UNITED STATES, Defendant-Appellant,* No. 27994, July 24, 1970, the United States Court of Appeals for the Fifth Circuit, stated:

> Where appeal by government from judgment entered in income tax refund suit was founded upon a *wholly separate section of the code,* and the different tax years *than those involved in the previous litigation, doctrines of res judicata and collateral estoppel were not applicable.*

CONCLUSIONS

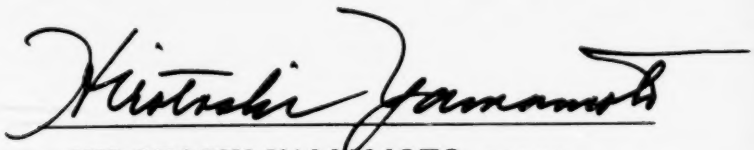
1. To arbitrarily collect taxes, penalties, and interest in the total amount of $53,640.94, without the required Statutory Notice of Deficiency Section 6212, and in complete disregard for the Statute of Limitations for the assessment of additional taxes is an abridg-

ment of taxpayers' rights under the *14th Amendment to* the United States Constitution.

2. The augmentation of the minimum taxes due of $26,896.05 to $53,640.84 (200%) with penalties and interests, without the opportunity of appellate review and consideration as afforded by the Statutory Notice of Deficiency is unconscionable and indicative of vindictiveness for failure to prevail in the $80.635.40 aborted assessment attempt by the Service.

WHEREFORE, Petitioners respectfully pray that this, the highest Court of the Land will find for the refund to petitioners, the $53,640.84 surreptitiously assessed and collected, together with costs and interest.

DATED: Honolulu, Hawaii, October 14, 1986.



HIROTOSHI YAMAMOTO, pro se

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HIROTOSHI YAMAMOTO, *Appellant,*	)	
v.	)	Appeal No. 86-848
	)	NOTICE OF APPEAL
THE UNITED STATES *Appellee*	)	

NOTICE OF APPEAL

Notice is hereby given of an Appeal to the United States Supreme Court for a Petition for Writ of Certiorari on the Mandate issued *July 18, 1986.* (Exhibit A)

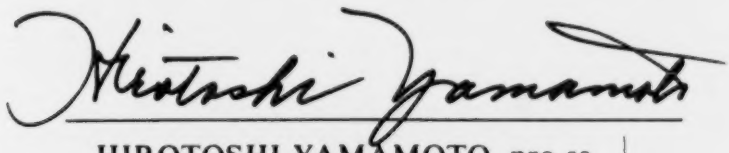
The Basis for the Appeal is as follows:

1. Additional income taxes cannot be assessed and collected without the explicit requirement of the statutory Notice of Deficiency, or the Ninety day letter, which is served on the taxpayer as a "Bill of Particulars".
2. Asserting the fact that Minimum Tax is Income Tax serves only to reinforce, rather than to mitigate the requirement of the statutory Notice of Deficiency.
3. Explicit compliance with the statutory Notice of Deficiency cannot accept "constructive", assumed or intended compliances.
4. Where Minimum tax, as a *separate section* of the Code, and was not previously litigated, res judicata cannot apply.
5. Where the *original* Notice of Deficiency, which was litigated, covers proposed assessments for Additional Normal Tax, and without any possible presumption of Minimum Tax liability whatsoever, said Original Notice of Deficiency cannot be construed as extending to Minimum Tax, subsequently assessed and collected, *without an explicit statutory Notice of Deficiency,* addressed to the specifices of Minimum Tax.
6. Without the required Statutory Notice of Deficiency, the Tax Court is without jurisdiction to assess the Minimum Tax being litigated; the Claims Court is without jurisdiction to waive the

explicit statutory requirement and to affirm the Tax Court's improper assessment.

7. Therefore, the United States Court of Appeals for the Federal Circuit has erred in affirming the assessment for Minimum Tax which was not supported by the required statutory Notice of Deficiency, or the Ninety Day letter.

DATED: Honolulu, Hawaii, July, 24, 1986.



HIROTOSHI YAMAMOTO, pro se

85-175 Farrington Hiway, B426
Waianae, Hawaii 96792

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HIROTOSHI YAMAMOTO,	)	Appeal No. 86-848
	)	
Appellant,	)	
	)	
	)	
THE UNITED STATES	)	
	)	
Appellee.	)	

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart

Francis X. Gindhart, Clerk

July 23, 1986
Date

cc: Mr. Hirotoshi Yamamoto
Mr. Roger M. Olsen, DOJ

Exhibit A-2-1

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HIROTOSHI YAMAMOTO, *Appellant,*	)	
v.	)	Appeal No. 86-848
THE UNITED STATES *Appellee*	)	

JUDGMENT

ON APPEAL from the United States Claims Court
in CASE NO(S). 690-84T

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

DATED June 11, 1986 Francis X. Gindhart

Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: July 18, 1986

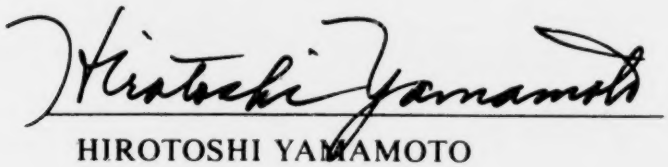
Exhibit A-3

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the foregoing NOTICE OF APPEAL were transmitted, postage prepaid, by the U.S. Postal Service to:

MICHAEL L. PAUP, Chief
Appellate Section, Tax Division
U. S. Department of Justice
Washington, D. C. 20530

DATED: Honolulu, Hawaii, July 24, 1986



HIROTOSHI YAMAMOTO

UNITED STATES TAX COURT

HIROTOSHI YAMAMOTO and SHIZUKO YAMAMOTO,	)	
Petitioners,	)	
v.	)	Docket No. 9726-75
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed February 28, 1980, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income taxes due from the petitioners for the taxable years 1970 and 1971 in the amounts of $3,041.87 and $23,854.18, respectively.

(Signed) Herbert L. Chabot
Judge.

Entered: July 24, 1980

UNITED STATES TAX COURT

HIROTOSHI YAMAMOTO, SHIZUKO YAMAMOTO, *Petitioners,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	)	Docket No. 9726-75

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted, on behalf of the respondent, in compliance with the Court's opinion determining the issues in this case, together with a proposed decision which is being lodged concurrently with said competition.

This computation is submitted without prejudice to respondent's right to contest the correctness of the decision entered herein by the Court.

N. JEROLD COHEN
Chief Counsel
Internal Revenue Service

Dated: June 13, 1980

By: (signed) Vernon Balmes
VERNON BALMES
Assistant District Counsel

Exhibit B-2

OF COUNSEL:

EMORY L. LANGDON
Regional Director
PETER D. BAKUTES
Attorney
Internal Revenue Service
Two Embarcadero Center, Suite 900
San Francisco, California 94111
Tel. No. (415) 556-1092

Exhibit B-3

CC:SF:TL:PDB
APP:SF:DL

COMPUTATION STATEMENT

In Re: Mr. Hirotoshi Yamamoto and
Mrs. Shizuko Yamamoto
2733 East Manoa Road
Honolulu, Hawaii 96822

Docket No. 9726-75

Income Tax

Year Ended	Deficiency
December 31, 1970	$ 3,041.87
December 31, 1971	$23,854.18

The details supporting the above computation are set forth on attached pages two to four, inclusive.

Exhibit B-4

Form 5278 January 1975	Department of the Treasury Internal Revenue Service **Statement - Income Tax Changes**	Return Form No. 1040	Schedule No. 1

Name of Taxpayer(s)

YAMAMOTO, HIROTOSHI & SHIZUKO

☐ Notice of Deficiency
☐ Settlement Computation
☒ Other *(specify)*
RULE 155

	Tax Years Ended	
1. Adjustments to income	12/31/70	12/31/71
a. Long-Term Capital Gains	14,244.70	143,865.91
b. Section 1239 Income	(28,489.39)	(287,731.82)
c. Correction to math error on statutory notice	.09	
2. Total adjustments	(14,244.60)	(143,865.91)
3a. ☒ Taxable income ☐ Adjusted gross income b. As shown in: ☐ Preliminary letter dated _____ ☒ Notice of deficiency dated 8/13/75 ☐ Return as filed	22,179.56	180,409.43
4. ☒ Taxable income as revised ☐ Adjusted gross income as revised	7,934.96	36,543.52
5. Tax per original return	1,381.58	10,584.58
6. Alternative tax if applicable *(from page _____)*		
7. Tax surcharge for 1970 included in line 5		_____
8. Corrected tax liability *(Lesser of line 5 or 6, plus line 7)*	1,381.58	10,584.58
9. Less credits *(specify)* a.		
b.		
c.		

Exhibit B-5

10. Balance *(line 8 less amounts on lines 9a through 9c)*		1,381.58	10,584.58
11. Plus	a. Tax from recomputing prior year investment credit		
	b. Self-employment tax		
	c. Minimum tax (Schedules 2 & 3)	3,041.87	23,854.18
12. Total corrected income tax liability *(line 10 plus amounts on lines 11a through 11c)*		4,423.45	34,438.76
13. Total tax shown on return or as previously adjusted		1,381.58	10,584.58
14. Statutory deficiency or over-assessment *(difference between lines 12 and 13)*		3,041.87	23,854.18
15. Additions to the tax *(listed below)*			

Form **5278** (1-75)

IN THE UNITED STATES CLAIMS COURT

No. 690-84T

(FILED: November 26, 1985)

HIROTOSHI YAMAMOTO,	)	Tax refund; minimum tax is income tax; Claims Court is not appellate court to Tax Court; *res judicata* is applicable to tax cases including income taxation.
Plaintiff,	)	
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

Hirotoshi Yamamoto, Waianae, Hawaii, *pro se,* plaintiff.

David Gustafson, Washington D. C., with whom was *Glenn L. Archer, Jr., Mildred L. Seidman and Donald Olson,* for defendant.

OPINION

This is a tax refund case which comes before this court under section 56 of the Internal Revenue Code of 1954 (hereinafter referred to as the Code). Plaintiff seeks a tax refund of federal income tax in the amount of $53,640.98 which represents tax deficiencies assessed by the Internal Revenue Service for the taxable years 1970 and 1971, including interest and penalties. The case comes before this court on Defendant's Motion for Summary Judgment. Jurisdiction is conferred upon the court pursuant to 28 U.S.C. § 1491. *See Eastport Steamship Corp. v. United States,* 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967).

FACTS

Plaintiff, Mr. Hirotoshi Yamamoto, is a married individual who filed a joint return for the years 1970 and 1971.[1] On his tax return for these years, plaintiff reported capital gains without reporting any liability for the minimum tax pursuant to section 56 of the Code.[2] The Internal Revenue Service (the Service) notified plaintiff that the minimum tax was applicable to his determination of tax liability because of his large amount of capital gains. However, the Service subsequently decided to recharacterize part of plaintiff's income from capital gains to ordinary income. On June 6, 1973, the Service sent plaintiff a final examination report with the proposed recharacterization. Although this recharacterization decreased plaintiff's minimum tax liability under section 56, it resulted in an overall tax increase because more of plaintiff's income would be taxed at the higher ordinary income rates. Thus, on August 13, 1975, the Service sent plaintiff a Notice of Deficiency (also known as a "stat notice," "deficiency notice," or "90 day letter"), consistent with the final examination report as required by section 6212 of the Code.

In response to this Notice of Deficiency, plaintiff filed a petition for review in the Tax Court. In his petition to the Tax Court, plaintiff disputed the income recharacterization and also argued that the capital gains reported on his 1970 and 1971 tax returns were "non-recognition" income under section 351 of the Code.[3] *Yamamoto v.* Commissioner, 73 T.C. 946 (1980), *aff'd,* No. 80-7505, slip op. (9th Cir. Jan. 7, 1982). The Tax Court held that the income realized by plaintiff was not taxable as ordinary income nor did it constitute non-recognition income under section 351 of the Code. In order to "reflect . . . the effect of [this conclusion] on asserted liabilities for minimum tax," the Tax Court entered its decision under Rule 155, allowing each party to submit its own computation of the tax liabil-

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[1] The 1970 and 1971 income tax returns were signed by both Mr. and Mr. Yamamoto. This case, however, was brought by Mr. Yamamoto solely and Mrs. Yamamoto is not a party to this litigation.

[2] Section 56 of the Code imposes a minimum tax on items referred to as tax preference items. Tax preference items are defined in section 57 of the Code. Capital gains are one of these tax preference items found in section 57.

[3] Section 351 of the Code provides that no gain or loss shall be recognized if property is transferred to a corporation in exchange for stock, if after the exchange the transferors are in control of the corporation.

ity due. *Id.* at 962.

On June 13, 1980, the Service filed a computation of plaintiff's tax liability, which included a minimum tax on plaintiff's capital gains, requesting the Tax Court to find a deficiency in the amount of $3,041.87 and $23,854.18 for the taxable years 1970 and 1971, respectively. Plaintiff did not file a computation with the Tax Court. Therefore, the Tax Court entered its decision on July 24, 1980 using only the Service's computation pursuant to the Rule 155 procedure. On September 8, 1980, plaintiff filed a Notice of Appeal in the United States Court of Appeals for the Ninth Circuit limited to the issue of the Tax Court's denial of the non-recognition of gain under section 351 of the Code. In the interim, the Service assessed the deficiency found by the Tax Court but made no attempt to collect any tax liability from plaintiff while the appeal was pending. The Ninth Circuit affirmed the Tax Court in an unpublished opinion issued on January 7, 1982. *Yamamoto v. Commissioner,* No. 80-7505, slip op. (9th Cir. Jan. 7, 1982).

By letter dated September 24, 1982, the Service demanded payment from the plaintiff of the amounts previously assessed plus interest and penalties incurred since the asessment date. Plaintiff paid the deficiencies and filed a claim for refund with this court. On July 25, 1984, plaintiff's Complaint was dismissed for failure to file a claim for refund with the Service which the court determined was a prerequisite to invoke its jurisdiction over tax refund claims. *Yamamoto v. United States,* No. 704-85T (Cl. Ct. July 25, 1984) (order granting dismissal of Complaint). Subsequently, plaintiff filed a claim for refund with the Service which was denied on May 10, 1984. Having satisfied the necessary jurisdictional prerequisites, plaintiff filed a new Complaint with this court on December 24, 1984.

Plaintiff contends that in a review of his tax liability for the years 1970 and 1971, the Tax Court lacked the authority to determine the amount of a deficiency for a minimum tax on capital gains. The defendant moved for summary judgment on the grounds that this court cannot review the plaintiff's claim because it is *res judicata,* or, in the alternative, that the statutorily required Notice of Deficiency was issued to plaintiff, thus giving him advance notice of the minimum tax issue. The court agrees with defendant's contention that the doctrine of *res judicata* bars this court from reviewing plaintiff's claim, and accordingly grants defendant's Motion for Summary Judgment.

DISCUSSION

The gravamen of plaintiff's contention is that the Tax Court cannot determine a deficiency for the minimum tax under section 56 while reviewing plaintiff's income tax liability for the same years without issuing another Notice of Deficiency. The validity of this claim rests squarely on plaintiff's assertion that the minimum tax is not an income tax but is a "separate" tax. However, this court recently held that the minimum tax is an income tax. *Mobley v. United States,* No. 620-81T, slip op. (Cl. Ct. Sept. 20, 1985). In addition, prior judicial considerations of the minimum tax have concluded that it is an income tax. *See e.g., Whyly v. United States,* 662 F.2d 397 (5th Cir. 1981) (minimum tax is a tax on income and is therefore constitutional); *Stranahan v. Commissioner,* 43 T.C.M. 883 (1982) (minimum tax assessment on intangible drilling costs and percentage depletion deductions constitutes an income tax); *Graff v. Commissioner,* 74 T.C. 743 (1980), *aff'd,* 673 F.2d 784 (5th Cir. 1982) (minimum tax on capital gains is an income tax and is not subject to apportionment among the states or by census under the Sixteenth Amendment). Thus, this court concludes that the Tax Court's decision is *res judicata* and bars plaintiff from further litigating his claim before this court.

The landmark decision addressing the application of the doctrine of *res judicata* to tax cases is *Commissioner v. Sunnen,* 333 U.S. 591 (1984). In *Sunnen,* the Supreme Court defined the doctrine as follows:

> [W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit . . . are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'

Id. at 597, (quoting *Cromwell v. County of Sac,* 94 U.S. 351, 352 (1877)). The Court then proceeded to apply the doctrine of *res judicata* to the area of federal income taxation as follows:

> Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause

> of action. Thus, if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year.

Sunnen, 333 U.S. at 598.

The doctrine of *res judicata*, as described in *Sunnen*, has been consistently applied by this court to tax refund claims that have been previously litigated in the Tax Court. *See e.g., Cohen v. United States*, 2 Cl. Ct. 181 (1983) (refund claim for 1981 tax overpayment withheld to satisfy deficiencies found by Tax Court for previous years dismissed because previous Tax Court decision was *res judicata*); *Vaitkus v. United States*, 230 Ct. Cl. 815 (1982) (doctrine of *res judicata* barred claim for *de novo* review of Tax Court decision); *Sun Chemical Corp. v. United States*, 218 Ct. Cl. 702 (1978) (Tax Court determination of 1961 tax liability was *res judicata*, barring attempt to carry back alleged net operating losses for 1964).

The case at bar is not distinguishable on the grounds that the minimum tax was not the subject of the previous Tax Court litigation. The cause of action before the Tax Court centered on the plaintiff's income tax liability for the years 1970 and 1971. Because the minimum tax is an income tax (*Mobley v. United States*, No. 620-81T, slip op. (Cl. Ct. Sept. 20, 1985)), the Tax Court did have jurisdiction over the minimum tax issue and this issue was a subject of that litigation. Thus, the Tax Court's decision "bars further litigation not only on those aspects of the [claim] which were actually raised, but also on the issues which could have been presented." *Erickson v. United States*, 159 Ct. Cl. 202, 216 (1962). Therefore, it was incumbent upon plaintiff to raise any objection to the determination of a minimum tax liability before the Tax Court or on appeal before the United States Court of Appeals for the Ninth Circuit. Having failed to do so, it is the conclusion of this court that the Tax Court's decision bars plaintiff from further litigating his claim before this court.

Although the court acknowledges that section 7842(a) of the Code provides that "[t]he United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court," thus leaving this court without jurisdiction to review the Tax Court's decision, this court deems it appropriate to comment on the procedures

accompanying the determination of plaintiff's income tax liability for the years 1970 and 1971.

Section 6212 of the Code provides that when a tax deficiency is found, the service is required to send a Notice of Deficiency to the taxpayer. Plaintiff in the instant case received a Notice of Deficiency on August 13, 1975, when the Service recharacterized some of his income from capital gains to ordinary income. Pursuant to section 6213 of the Code, the taxpayer has the right to petition the Tax Court to review the deficiency, during which time the assessment of the tax is abated. Plaintiff exercised this right, and upon review the Tax Court held that the plaintiff's income constituted capital gains and entered its decision according to Rule 155 of the Tax Court. Section 6214(a) of the Code authorizes the Tax Court to redetermine a taxpayer's tax deficiency.[4] On July 24, 1980, the Tax Court, pursuant to section 6214(a) and Rule 155, redetermined the plaintiff's *income* tax deficiency for the taxable years 1970 and 1971. As part of its redetermination of plaintiff's tax liability, the Tax Court included the minimum tax on plaintiff's capital gains. The Tax Court's decision became final as defined by section 7481 when the Ninth Circuit affirmed the Tax Court's decision and plaintiff failed to file a petition for *certiorari* to the United States Supreme Court. When the Tax Court's decision became final, the Service notified plaintiff of its assessment for deficiency and demanded payment.

After reviewing the statutory framework and the procedures accompanying the determination of plaintiff's income tax liability as set out above, it is the view of this court that plaintiff had advance notice of the minimum tax issue and received the required Notice of Deficiency thus making the Tax Court's procedures entirely appropriate in the instant case.

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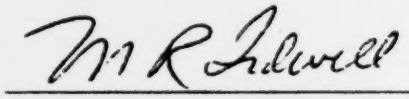
[4]The pertinent part of section 6214(a) of the Code reads as follows:

> [T]he Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or addition to the tax should be assessed, if claim therefore is asserted by the Secretary at or before the hearing or a rehearing.

CONCLUSION

The court accordingly grants Defendant's Motion for Summary Judgment and the clerk is directed to dismiss the Complaint.



MOODY R. TIDWELL
Judge

Exhibit C-7

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HIROTOSHI YAMAMOTO	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 86-848
	)	
THE UNITED STATES,	)	
	)	
Appellee	)	
	)	

DECIDED: June 11, 1986

Before MARKEY, *Chief Judge,* BALDWIN and NEWMAN, *Circuit Judges.* PER CURIAM.

DECISION

The judgment of the United States Claims Court, granting the United States' motion for summary judgment and dismissing the complaint of Hirotoshi Yamamoto, is *affirmed* on the basis of the Claims Court's opinion reported at 9 Cl. Ct. 207 (1985).

Exhibit D

Internal Revenue Service
Regional Commissioner

Department of the Treasury

Date: August 13, 1975

Tax Year Ended and Deficiency:

December 31, 1970	$ 5,057.93
December 31, 1971	75,577.47

CERTIFIED MAIL

Mr. Hirotoshi Yamamoto and
Mrs. Shizuko Yamamoto
2733 East Manoa Road
Honolulu, Hawaii 96822

Person to Contact:
Mr. Arthur A. Minnie
Contact Telephone Number:
(415) 556-7598

Dear Mr. and Mrs. Yamamoto

This letter is a NOTICE OF DEFICIENCY—as required by law—that we have determined the income tax deficiencies shown above. We regret we have been unable to reach a satisfactory agreement in your case. The enclosed statement shows how the deficiencies were computed.

If you do not intend to contest this determination in the United States Tax Court, please sign and return the enclosed waiver form. This will permit an early assessment of the deficiencies and limit the accumulation of interest. The enclosed self-addressed envelope is for your convenience.

If you decide not to sign and return the waiver, the law requires that after 90 days from the date of mailing this letter (150 days if this letter is addressed to you outside the United States) we assess and bill you for the deficiencies. However, if within the time stated you contest this determination by filing a petition with the United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217, we may not assess any deficiencies and bill you until after the Tax Court had decided your case. You can obtain a copy of the rules for filing a petition by writing to the Clerk of the Tax Court at the Court's Washington, D.C., address stated above.

If you intend to file a petition with the United States Tax Court, you must do so within the time stated above (90 or 150 days, as the

Exhibit E-1

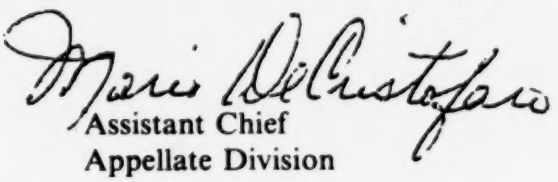
case may be); this period is fixed by law, and the Court cannot consider your case if your petition is filed late.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

Donald C. Alexander

Commissioner
By



Assistant Chief
Appellate Division

Enclosures:
Statement
Waiver
Envelope

Two Embarcadero Center, Suite 800, San Francisco, CA 94111

Form L-21 AD (Rev. 11-74)

Exhibit E-2

FORM **4089** (REV. MAY 1970)	Department of the Treasury — INTERNAL REVENUE SERVICE **STATUTORY NOTICE STATEMENT**	Symbols App:San Francisco AA:LS

Hirotoshi Yamamoto and Shizuko Yamamoto
2733 East Manoa Road
Honolulu, Hawaii 96822

KIND OF TAX
Income

TAX YEAR ENDED	**DEFICIENCY**
December 31, 1970	$ 5,057.93
December 31, 1971	75,577.47
Total	$80,635.40

In making this determination of your income tax liability, careful consideration has been given to your claim for refund filed on May 1, 1974. If a petition to the United States Tax court is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Tax Court in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by certified mail in accordance with section 6532(a)(1) of the Internal Revenue Code.

Alfred Y..K. Au, C.P.A.
1153 Twelfth Avenue, Room 1
Honolulu, Hawaii 96816

☒ Copy to Authorized Representative:

FORM **4089** (REV. 5-70)

Exhibit E-3

Form **3611** (Rev. 3-74)	**INDIVIDUAL INCOME TAX**	Statement Schedule 1

Name	Taxable Years Ended	
Hirotoshi Yamamoto and Shizuko Yamamoto	Dec. 31, 1970	Dec. 31, 1971
Taxable income as Shown in: ☒ Return as Filed ☐ Preliminary Letter Dated ☐ Statutory Notice Dated	7,934.96	36,543.52
Increases (or Decreases) in Income *(See attached explanation of items)*		
(a) Long-term capital gains	(14,244.70)	(143,865.91)
(b) Section 1239 income	28,489.39	287,731.82
Taxable Income as Revised	22,179.56	180,409.43
Tax Computation Tax 1971—Income averaging-Sch. 2	5,077.46	84,040.00
Tax surcharge—2.5% for 1970	126.94	
Subtotal	5,204.40	84,040.00
Add: Minimum Tax—Schedules 3 & 4	1,235.11	2,122.05
Tax from Recomputing Prior Year Investment Credit		
Tax Liability	6,439.51	86,162.05
Liability Previously Assessed Original return as filed	1,381.58	10,584.58
Increase (or Decrease) in Tax	5,057.93	75,577.47

Form **3611** (Rev. 3-74)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the doregoing Petition for Certiorari were transmitted, postage prepaid, by the U.S. Postal Service to:

MICHAEL L. PAUP, Chief
Appellate Section, Tax Division
U. S. Department of Justice
Washington, D. C. 20530

DATED: Honolulu, Hawaii, October 14, 1986

HIROTOSHI YAMAMOTO

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-709

In the Supreme Court of the United States

OCTOBER TERM, 1986

HIROTOSHI YAMAMOTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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§ 6512 4

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-709

HIROTOSHI YAMAMOTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Claims Court erred in dismissing, on grounds of res judicata, his refund suit that sought to challenge the minimum tax liability imposed upon him by a prior final decision of the Tax Court.

1. a. Petitioner reported substantial amounts of capital gains on his income tax returns for 1970 and 1971 without reporting any minimum tax liability pursuant to 26 U.S.C. (1970 ed.) 56. The Internal Revenue Service initially notified petitioner that the minimum tax was applicable to the determination of his income tax liability because of the large amount of capital gains. After final examination of the returns, however, the IRS concluded that much of the income reported as capital gains should be recharacterized as ordinary income. Based on this conclusion, the Commissioner sent petitioner a notice of deficiency asserting deficiencies of $5,058 for 1970 and $75,577 for 1971. Petitioner

then petitioned the United States Tax Court for a redetermination of his tax liabilities for those years. Pet. App. C2.

The litigation in the Tax Court focused on the parties' dispute over the correct tax treatment of petitioner's gain from the transfer of certain stock. The court rejected both the Commissioner's contention that the gain was ordinary income and petitioner's contention (contrary to the position that he had taken on his returns) that the gain was nonrecognition income under Section 351 of the Code.[1] Instead, the Tax Court concluded that the gain was taxable as capital gain, as originally reported by petitioner on his tax returns. *Yamamoto* v. *Commissioner*, 73 T.C. 946 (1980), aff'd, 672 F.2d 924 (9th Cir. 1982). See Pet. App. C2.

In order to "reflect * * * the effect of these conclusions [and various concessions by the parties] on asserted liabilities for minimum tax," the Tax Court stated that its decision would be entered under Tax Court Rule 155, which allows each party to submit its own computation of the resultant deficiency. 73 T.C. at 962. The Commissioner filed proposed computations showing a tax deficiency for 1970 in the amount of $3,042 and for 1971 in the amount of $23,854. Both computations reflected petitioner's liability for the minimum tax. Petitioner neither objected to the Commissioner's proposed computations nor filed any proposed computations of his own. The Tax Court entered its decision in the amounts submitted by the Commissioner. The court of appeals affirmed the Tax Court's decision. Pet. App. C2-C3.[2]

---

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[2]Petitioner challenged on appeal only the Tax Court's ruling that his gain on the transfer of stock had to be recognized. He did not challenge the Tax Court's acceptance of the Rule 155 computation submitted by the Commissioner.

b. After paying the tax assessed in accordance with the Tax Court's decision, together with accrued penalties and interest, petitioner filed suit for a refund in the United States Claims Court, disputing the imposition of minimum tax liability. The Claims Court originally dismissed the suit for failure to file an administrative refund claim. Petitioner then filed a refund claim with the IRS, which was denied, and returned to the Claims Court in the instant action. Pet. App. C3.

The Claims Court granted the government's motion for summary judgment and dismissed petitioner's complaint, holding that the doctrine of res judicata barred petitioner from litigating his claims because his income tax liabilities for 1970 and 1971 had been the subject of a prior Tax Court decision that had become final. Pet. App. C1-C7; 9 Cl. Ct. 207. The court of appeals affirmed in a one-line decision on the basis of the Claims Court's opinion (Pet. App. D; 795 F.2d 1018).

2. Petitioner contends (Pet. 3-4) that the Tax Court's decision as to his income tax liability for the tax years in question does not preclude relitigation of the minimum tax component of that liability in the instant refund suit. This contention apparently is based (1) on the fact that the Commissioner did not issue a new notice of deficiency addressed to the minimum tax question after the Tax Court held that the gain from the stock transaction should be treated as capital gain; and (2) on the assertion that petitioner did not receive judicial review of his minimum-tax arguments. This contention is wholly without merit.

When petitioner filed his Tax Court petition for redetermination of the deficiencies asserted in the notice of deficiency sent to him for 1970 and 1971, the Tax Court acquired exclusive jurisdiction to redetermine the correct amount of any deficiency or overpayment for those tax

years. See I.R.C. §§ 6214 and 6512. The Commissioner thereupon was barred from sending petitioner further notices of deficiency for the periods at issue. See I.R.C. § 6212(c). Pursuant to Section 6214 and Rule 155 of its Rules, the Tax Court redetermined petitioner's income tax deficiencies for 1970 and 1971, and it included in the computation of those deficiencies the minimum-tax liability occasioned by petitioner's receipt of capital gains.[3] The fact that petitioner, for whatever reason, did not challenge the minimum-tax aspect of the Tax Court's decision in that court or on direct appeal provides no basis for avoiding the res judicata effect of the Tax Court's decision. See *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948).[4]

Petitioner's reliance (Pet. 4) on *Thompson* v. *United States*, 430 F.2d 388 (5th Cir. 1970), cert. denied, 401 U.S. 940 (1971), is entirely misplaced. That case involved different tax years from those involved in the prior litigation, and hence it was quite clear that the first litigation had no res judicata effect that could bar the later suit. It is well established that each tax year is a separate cause of action. Thus, a final Tax Court decision with respect to liability for a

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[3]It is well established that minimum-tax liability is part of the income tax. See, *e.g.*, *Trainer* v. *United States*, 800 F.2d 1086 (Fed. Cir. 1986), petition for cert. pending, No. 86-904; *Ward* v. *United States*, 695 F.2d 1351, 1355 (10th Cir. 1982); *Graff* v. *Commissioner*, 74 T.C. 743, 765 (1980), aff'd, 673 F.2d 784 (5th Cir. 1982). See also *United States* v. *Darusmont*, 449 U.S. 292 (1981).

[4]In addition to holding correctly that the instant suit was barred by res judicata, the Claims Court went on to note that petitioner "had advance notice of the minimum tax issue" and that "the Tax Court's procedures [were] entirely appropriate in the instant case" (Pet. App. C6). Thus, there can be no suggestion that petitioner is the victim of some procedural trap for the unwary. He had every opportunity to raise his minimum-tax contentions at the appropriate time in the appropriate forum, and there is no reason to provide him now with the opportunity to institute a new round of litigation involving closed tax years.

given year, under basic res judicata principles, bars further litigation as to that tax year, with respect both to issues that were actually raised and to issues that could have been presented but were not. See *Commissioner* v. *Sunnen*, 333 U.S. at 598-599.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-709

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HIROTOSHI YAMAMOTO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITIONER'S REPLY BRIEF

HIROTOSHI YAMAMOTO, pro se
85-175 Farrington Highway, B426
Waianae, Hawaii 96792

For Petitioner

QUESTION PRESENTED

Whether compliance with the Statutory Notice of Deficiency, Section 6212 of the Internal Revenue Code is mandatory, absolute, explicit and unequivocal.

Whether the Tax Court can be conjured to have jurisdiction, admittedly without the Statutory Notice of Deficiency.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HIROTOSHI YAMAMOTO,
Petitioner

v.

THE UNITED STATES,
Respondent

PETITIONER'S REPLY BRIEF

The determination of the validity of the assessment of Minimum Tax in the above entitled case must be determined by consideration of the following:

JURISDICTION

1. The required Statutory Notice of Deficiency, Section 6212, must be explicitly and unequivocably complied with as a condition precedent to the initiation of any proposed tax adjustment. It broaches of no constructive compliances in whatever manner or form.

2. The Tax Court is without jurisdiction in the matter of the deficiency in Minimum Tax in the above entitled case, since the deficiency surfaced for the first time at the conclusion of a tax case in which the issue then litigated was normal gain (100% taxable) under Section 1239 versus tax free exchange under Section 351.
3. The facts of the case clearly indicates that the Minimum Tax Deficiency was never a part of a prior Statutory Notice of Deficiency. Nor can the minimum tax deficiency be determined to be analogous or contiguous to the contentions or issues raised by either Petitioner or Respondent, in their prior litigation.

ARGUMENT

There is no basis to support the conclusion of res judicata based on the Tax Court's decision, for without the Statutory Notice of Deficiency convering the Minimum Tax assessment in question, the Tax Court is shorn of any jurisdiction in the matter.

Furthermore, because the assessment of the minimum tax at issue was the result and consequence of the Service's failure to prevail in its original attempt to establish Normal Gain, foresaking its opportunity to then prevail on the question of Minimum Tax, much time has been lost.

For even if there were compliance with the Statutory Notice of Deficiency, such compliance will still be aborted by the Statute of Limitations in attempting the new assessment at such a late date. (*Reg.* § *301. 6501(a)-1*)

CITATION

The dictum of the Court in *Thompson v. United States* 430 F.2d 388 (5th Cir. 1970) is appropriate, in that the case at hand reflects a parallel, though not an analogous situation.

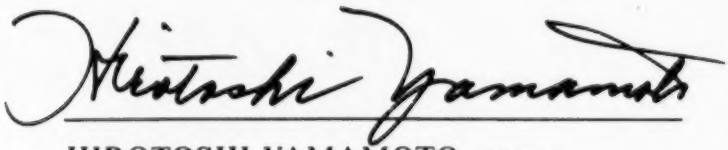
If the Court can distinguish the separation of different years, the separation of different tax provisions of the Code should likewise be recognized. Minimum Tax belongs to an entirely different section of the Code, wholly distinct and apart in calculations from the provisions of the Code for the determination of ordinary income

taxes. A mere examination of the tax return form itself will clearly show that the Service has characterized and classified Minimum Tax as *Other Taxes*.

CONCLUSION

Wherefore Petitioner respectfully requests a SUMMARY DISPOSITION ON THE MERITS in accordance with Rule 23(1) of the Supreme Court. And that Petitioner be awarded his refund of $53,640.84, plus interest, and cost.

DATED: Honolulu, Hawaii, January 12, 1987.



HIROTOSHI YAMAMOTO, pro se
for Petioner

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the foregoing Petitioner's Reply Brief were transmitted, postage prepaid, by the U.S. Postal Service to:

CHARLIES FRIED,
Solicitor General
Department of Justice
Washington, D.C. 20530

DATED: Honolulu, Hawaii, January 12, 1987.

HIROTOSHI YAMAMOTO